

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

TABATHA R. McMILLION
Claimant

VS.

PAYLESS SHOE SOURCE

Respondent

Self Insured

AND

WORKERS COMPENSATION FUND

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Docket No. 172,743

ORDER

Claimant requested review of the Award dated March 30, 1995, entered by Special Administrative Law Judge William F. Morrissey.

APPEARANCES

George H. Pearson of Topeka, Kansas, appeared for the claimant. James C. Wright of Topeka, Kansas, appeared for the respondent. Darin M. Conklin of Topeka, Kansas, appeared for the Workers Compensation Fund.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

ISSUES

The Special Administrative Law Judge awarded claimant permanent partial general disability benefits for a 15 percent work disability. The only issue on this review is the nature and extent of claimant's disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

The Award entered by the Special Administrative Law Judge should be modified.

The Special Administrative Law Judge found that claimant developed bilateral carpal tunnel syndrome while working for the respondent and also found that the appropriate date of accident for the period in question was December 10, 1992. Because the parties did not question those findings, the Appeals Board adopts those conclusions as its own.

The Special Administrative Law Judge determined that claimant had sustained a work disability as a result of the bilateral carpal tunnel syndrome. Claimant argued that the work disability was too low and respondent argued that claimant's benefits should be limited to the functional impairment. The Appeals Board agrees with respondent's argument.

The determination of permanent partial disability benefits is governed by K.S.A. 1992 Supp. 44-510e which provides:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than [the] percentage of functional impairment. . . . There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury."

The evidence is uncontroverted that after claimant recovered from bilateral carpal tunnel releases, respondent returned her to work in a light duty position that paid a comparable wage. Although claimant argued the presumption of no work disability should not be applied because the job respondent provided claimant was inappropriate, that contention is not supported by the evidence. To the contrary the evidentiary record establishes that respondent provided claimant a legitimate light duty job in which claimant replaced price tags in shoe boxes and repacked the boxes. Claimant is able to perform that job without violating medical restrictions.

A primary purpose of the Workers Compensation Act is to return injured workers to jobs paying comparable wages. When that goal is accomplished and in the absence of special circumstances, the respondent is entitled to the statutory presumption of no work disability. When viewing the record as a whole, claimant has not overcome that presumption.

Based upon the testimony of P. Brent Koprivica, M.D., and William O. Reed, Jr., M.D., the Appeals Board finds that claimant has sustained a whole body functional impairment in the range of 5 to 10 percent as a result of the upper extremity injuries. Dr. Reed testified that claimant had a 5 percent whole body functional impairment for the upper extremities and Dr. Koprivica testified that claimant had a 10 percent whole body functional impairment. Because both doctors' opinions are reasonable and there appears to be no valid reason to give one doctor's rating greater weight than the other, the Appeals Board averages those ratings and finds that claimant has sustained a 7.5 percent whole body functional impairment as a result of the December 10, 1992 accident for which claimant should receive permanent partial disability benefits.

The Appeals Board hereby adopts the Special Administrative Law Judge's findings and conclusions as set forth in the Award to the extent they are not inconsistent with the above.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award dated March 30, 1995, entered by Special Administrative Law Judge William F. Morrissey should be, and hereby is, modified.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Tabatha R. McMillion, and against the respondent, Payless Shoe Source, for an accidental injury which occurred December 10, 1992, and based upon an average weekly wage of \$260.28 for 9.81 weeks of temporary total disability compensation at the rate of \$173.53 per week or \$1,702.33, followed by 2.14 weeks of temporary partial disability benefits in the sum of \$173.53 per week, or \$371.35, and 403.05 weeks permanent partial disability at the rate of \$13.01 per week or \$5,243.68, for a 7.5% whole body functional impairment, making a total award of \$7,317.36.

As of December 5, 1996, there is due and owing claimant 9.81 weeks of temporary total disability compensation at the rate of \$173.53 per week, or \$1,702.33, followed by 2.14 weeks of temporary partial disability compensation at the rate of \$173.53 per week, or \$371.35, followed by 196 weeks of permanent partial disability compensation at the rate of \$13.01 per week, or \$2,549.96, for a total of \$4,623.64 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$2,693.72 is to be

paid for 207.05 weeks at the rate of \$13.01 per week until fully paid or further order of the Director.

Pursuant to stipulation, the Workers Compensation Fund is ordered to pay and reimburse 50% of the benefits and costs associated with this accident and Award.

The Appeals Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of December 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: George H. Pearson, Topeka, KS
James C. Wright, Topeka, KS
Darin M. Conklin, Topeka, KS
Office of Administrative Law Judge, Topeka, KS
Philip S. Harness, Director